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No. 91-975

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LEO J. SONNENBURG, GERALD HARNETT AND DENNIS SHEFFIELD,

Petitioners,

v.

EVAN BAYH, GOVERNOR OF THE STATE OF INDIANA AND JERRY THADEN, COMMISSIONER OF THE INDIANA DEPARTMENT OF MENTAL HEALTH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Respondents have identified no factual or procedural complication that would make this case an inappropriate vehicle for resolving the important federal questions presented. On the contrary, respondents' efforts to defend and recast the holding of Indiana's highest court underscore the threat that decision poses to the rights guaranteed by the Thirteenth Amendment.

I. RESPONDENTS READ THE DECISION BELOW AS CREATING AN EXCEPTION TO THE THIRTEENTH AMENDMENT EVEN MORE UNPRINCIPLED AND UNBOUNDED THAN THE ONE IDENTIFIED BY PETITIONERS.

Respondents do not attempt to defend Indiana's regime of mental patient peonage within the framework of the civic duty exception to the Thirteenth Amendment that was relied upon -- erroneously -- by the court below. Instead, respondents read the decision of the Indiana Supreme Court even more broadly, as creating a "common law" exception that approves of all forms of involuntary servitude that have a sufficient heritage to qualify as "historically based national practice[s]." Respondents' Brief ("Resp. Br.") 8. Apparently, if enough states engaged in a form of forced labor for long enough, then it is altogether immunized from constitutional challenge. This standard would make the Thirteenth Amendment a nullity, since African slavery itself was well rooted in the common law of the southern states when the Amendment was adopted.[1] The Thirteenth Amendment was, after all, adopted to change history, not to repeat it. Even read more narrowly, this standard would license practices long condemned by this Court, such as peonage and indentured servitude, because those forms of bondage were practiced in Indiana and other states since the late 18th century.[2] Nor is this

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[1] *See* M. Tushnet, *The American Law of Slavery, 1810-1860* 90-121 (1981); *Calhoun v. Calhoun*, 2 S.C. 283, 306-07 (1870).

[2] For example, the Northwest Ordinance of 1787, traditionally understood to be the model for the Thirteenth Amendment, was at one time interpreted in the Indiana Territory as permitting both indentured servitude (even of black slaves brought into the territory) and peonage. *See* Hamilton, *The*

only a matter of one remedy or another; as respondents defend it, the holding below means that these forms of involuntary servitude are now *constitutional*. The need for plenary review by this Court to correct so radical a restriction of the Thirteenth Amendment's substantive reach is clear.

In addition to expanding the already broad swath that the decision below cuts through the Thirteenth Amendment, respondents defend Indiana's regime of mental patient peonage on a ground that is in fact foreclosed by the decision below. Unpaid, full-time, institutional labor extracted from mental patients who reasonably feared isolation cells, prolonged civil commitment and electric shock (A32) is, we are now told, "industrial therapy." Resp. Br. 2, 3, 4.[3] This perverse theory -- which would permit no distinction between, for example, forced labor in a hospital boiler room and forced manufacture of goods for sale -- was rejected not only by the trial and lower appellate courts, *see* Petition for Certiorari ("Cert. Pet.") 5, but by the Indiana Supreme Court as well. That court nowhere suggested that patients were put to work in response to their own needs for medical or psychiatric treatment. Rather, the court recognized that in order to meet the *state's needs*, "Indiana's many laws concerning the mentally ill contemplated the use of patient labor without paying wages." (A26). The court further held (1) that "[t]he State clearly initiated the process of putting patients to work," (2) that work requirements were "backed up with the use or threatened use of th[e] legal process" to "delay[] release from the institution," and (3) that fear of physical punishment "created a coercive atmosphere that reasonably led patients to believe that they

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Legislative and Judicial History of the Thirteenth Amendment, 9 Nat.B.J. 26, 50-51 (1951).

[3] Respondents' attempt to reargue before this Court the testimony and evidence that was adduced at trial is unavailing. *See* Resp. Br. 4-6, 13. The trial court found that the evidence supported petitioners' claims and the Indiana Supreme Court did not question the factual basis for petitioners' claim of involuntary servitude -- it simply rejected the applicability of the Thirteenth Amendment to mental patient labor. Cert. Pet. 6-7. (A5 n.5; A19-20).

were not free to refuse work." (A32). *See* Cert. Pet. 6-7, 10-11.[4]

Patients can refuse therapy, but petitioners --including those who had paid the full costs of their hospitalization -- could not refuse to work. The Indiana legislature itself characterized what respondents call "industrial therapy" as mental patient "peonage," Cert. Pet. 2, and respondents' own attempt to justify this forced labor as a "common law" duty to provide labor, which the state has supposedly demanded of its citizens since 1816, demonstrates that even respondents themselves do not genuinely believe it is therapy.

Respondents dismiss as "bizarre" the theory that coerced labor by mental patients could amount to involuntary servitude, Resp. Br. 2, yet they concede that many federal and state courts have recognized the Thirteenth Amendment implications of such forced labor. *Compare* Resp. Br. 11-12 n.9 *with* Cert. Pet. 9-10 & n.10. Federal cases including *Jobson v. Henne*, 355 F.2d 129 (2d Cir. 1966), establish a standard for claims of involuntary servitude in mental hospitals, and when that standard has been met damages and injunctive or declaratory relief have been awarded. Cert. Pet. 10, 16 & n.19. The decision below conflicts with this body of law; indeed, the decision below flatly holds that the Thirteenth Amendment is *inapplicable* to coerced labor in mental institutions or in any other context where the state claims a "civic duty" -- or, as

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[4] Respondents dismiss these threats as mere "psychological coercion" and then misrepresent this Court's opinion in *United States v. Kozminski*, 487 U.S. 931 (1988). Resp. Br. 9 n.8. On the very page from which respondents purport to quote, this Court held that "the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use *or threat* of physical restraint or physical injury, or by the use *or threat* of coercion through law or the legal process. This definition encompasses those cases in which the defendant holds the victim in servitude by placing the victim *in fear of such physical restraint or injury or legal coercion*. . . . [T]he vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve." 487 U.S. at 952 (Emphasis added). Accordingly, respondents gain nothing from the fact that no trial witness had actually seen a patient being punished with electric shocks for *refusing* to work, Resp. Br. 4: the threat alone obviously *worked*.

respondents would have it, a "common law" tradition -- of exacting involuntary, uncompensated labor.

As even respondents acknowledge, the issues raised by that holding may have important, and chilling, implications for public programs such as "workfare" for the poor and "token" economies for the handicapped. Resp. Br. 13. If the Thirteenth Amendment sets no limits on the power of a state to hospitalize the mentally ill and the mentally retarded with promises of care and treatment and then, once they are committed to the program, to compel these patients to perform full-time, unpaid menial labor to meet the state's institutional needs in a coercive atmosphere rife with threats of confinement and physical punishment, then the potential for abuse in fiscally strapped programs for the homeless, the handicapped and others at the margins of society is likewise unlimited by the Thirteenth Amendment.

Finally, respondents dismiss this case as "academic" and insignificant because Indiana supposedly no longer practices mental patient peonage. Resp. Br. 14. Leaving aside for the moment that petitioners and their class are still entitled to restitution for the years during which Indiana *did* extract such labor, the decision below authorizes its resumption at any time, and cases cited in the petition document the widespread persistence of this abuse in both state-run and private mental institutions throughout the nation. Cert. Pet. 9-10 & n.10. Sadly, involuntary servitude is not a thing of the past: as recently as 1989, patients at Mississippi's Boswell Retardation Center were shackled at the ankles and forced to perform unpaid, heavy manual labor -- on what the institution itself candidly referred to as the "chain gang" -- outdoors during the winter without even coats or gloves.[5] Exploitation to which the respondents euphemistically refer as unpaid, involuntary "therapy" still exists, and respondents insist on the state's right to employ it at will, defending the holding below that the historical pedigree of such exploitation eliminates both the need for and the possibility of Thirteenth

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[5] *See* Deposition with Exhibits of Director Paul Cotten, Oct. 12, 1989, in *Jackson v. Fort Stanton Hospital and Training School et al.*, No. CIV 87-839 (JP)(U.S.Dist. Ct. New Mexico).

Amendment scrutiny. Plenary review is thus clearly warranted.

II. THE ISSUE OF A JUDICIAL REMEDY FOR THIRTEENTH AMENDMENT VIOLATIONS IS ALSO SQUARELY PRESENTED BY THIS CASE.

The trial court's final judgment confirms that petitioners sought recovery of restitution for forced labor not only pursuant to 42 U.S.C. § 1983, but also directly under the "United States Constitution Amendment 13 (Involuntary Servitude)" as a "separate and distinct" ground. (A64). Accordingly, the Indiana Supreme Court addressed this issue and squarely held that, although "suits attacking the 'badges and incidents of slavery' must be based on statute, suits attacking compulsory labor itself may rest on the thirteenth amendment." (A18). Although the respondents have not filed a cross-petition for certiorari, they now challenge that holding, denying the existence of *any* direct right of action under the Thirteenth Amendment, regardless of the form of relief sought. Resp. Br. 14-16. This underscores the importance of the second question presented and a further reason for this Court to grant the writ.[6]

With respect to the restitution for involuntary labor awarded by the trial and intermediate appellate courts in this case, respondents contend that, although this Court's recent precedents require the state to provide restitution when it takes an individual's physical property or collects an unconstitutional tax, the state owes an individual nothing when it unconstitutionally expropriates his or her personal labor. Respondents do not deny that their position inverts the scale of constitutional values that the Thirteenth Amendment was enacted to establish, *see* Cert. Pet. 18-21, nor do they deny that this

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[6] As the court below noted in rejecting respondents' argument (A17-18 & n.13), all of the district court decisions relied upon by respondents, *see* Resp. Br. 16 n.11, involved complaints of racial discrimination rather than coerced labor, which lies at the core of the Thirteenth Amendment's "self-executing" abolition of slavery and involuntary servitude. *Kozminski*, 487 U.S. at 942 (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883)).

Court's recent decisions reflect a growing resolve that government must be forced to disgorge that which it illegally appropriates. Respondents would distinguish *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 S.Ct. 2238 (1990), and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), on the grounds that the taxpayers in the former case had received from the county no "refund or . . . relief," Resp. Br. 17, and in the latter case the "property owner receives nothing if he is not paid" for a taking. *Id.* at 17 n. 12. In contrast, we are told, a mental patient such as witness Darlene Fulton, a former factory worker, supposedly "received value" in the form of work skills, *id.*, when she was forced to scrub floors 40 hours a week with a broken arm out of reasonably held fear of being stripped naked and locked up in an isolation cell. *See* Cert. Pet. 4; Tr. 1350-60. Slavery itself was of course once justified as being good for the slaves.[7]

Other courts have held that damages in the form of back pay are available to remedy violations of the Thirteenth Amendment, and at least one court has awarded such restitution. *See* Cert. Pet. 16-17 & n.19. The court below nevertheless held that no such relief is available under the Thirteenth Amendment in any circumstances. That question merits the attention of this Court.

Apparently fearing that this Court will indeed find the issue worthy of review, respondents argue that, in any event, "Any damage claim recovered by the plaintiffs would be mooted by the state's claim of $240 million for care and treatment, making this nothing more than a dispute over attorney fees." Resp. Br. 18 (capitalization omitted). Apart from the unseemly slur on the motives of petitioners' counsel, this cynical attempt to confuse the procedur-

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[7] Involuntarily committed patients received "value" of an additional kind for their labor. For example, petitioner Gerald Harnett, a former statistical analyst, was expressly told by hospital officials that he had to perform unpaid kitchen work if he ever wanted to be released from civil commitment. (Tr. 1199-1206). As the Indiana Supreme Court put it, "he 'had to work in order to gain [his] freedom.'" (A31 n.23)(brackets in original). It is hard to overlook the parallel to the notorious philosophy of "*arbeit macht frei.*"

al posture of this case flatly misrepresents the record. The crucial facts that respondents have chosen to elide are set forth in the opinion below:

First, in 1986, before the trial even began, respondents dismissed the counterclaim on which they would now rely. (A2). Therefore, there is no legal basis in this case on which to offset the Thirteenth Amendment award to petitioners.

Second, the "evidence" of the state's costs to which respondents refer was discussed by the court below only in relation to a very different claim under state law to which an offset was arguably available under a special statute. (A37 & n.27; A48). But that state law claim is not before this Court. Moreover, the Indiana Supreme Court noted that respondents themselves "acknowledged that the evidence was not such proof as might be necessary to prove a counterclaim." *Id.*

The dispute over petitioners' right to restitution for their involuntary servitude thus has not been and will not be mooted; this case remains a sound vehicle for resolving this important question of federal constitutional law.[8]

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[8] Respondents also argue that, "If a damages remedy were found, the Court would not apply it retrospectively to this case." Resp. Br. 19 (capitalization omitted). Aside from misapprehending retroactivity doctrine generally, and erroneously assuming that this is the first case in which damages have been awarded for involuntary servitude in a mental institution, *cf. Arahovitis v. State*, 466 N.Y.S.2d 928 (Ct.Cl. 1983), respondents' plea not to have an adverse decision in this case applied to the facts of this case is premature. The possibility of such a prospectivity ruling by this Court in the event petitioners prevail on the merits does not render this case any more "academic," Resp. Br. 20, than any of the other cases in which this Court has chosen to apply a new constitutional ruling prospectively.

III. THIS CASE IS ALSO AN APPROPRIATE VEHICLE FOR RESOLVING THE THIRD AND FOURTH QUESTIONS PRESENTED, WHICH HAVE BEEN RENDERED EVEN MORE TIMELY BY RECENT ORDERS OF THIS COURT.

Respondents' arguments on retroactivity doctrine and the application of the Fair Labor Standards Act to petitioners were all anticipated in the petition itself and require no further discussion. *See* Cert. Pet. 22-26. Unable to justify the unprecedented retroactivity ruling of the Indiana Supreme Court, which decided petitioners' claims on the basis of an overruled decision that was not the law either when the acts in question occurred or when the case was ultimately tried and decided on appeal, respondents seek to dissuade this Court from reviewing that ruling by conjuring distractions. Thus respondents claim that petitioners' FLSA claims are barred because written "opt-in" consents were not filed for each member of the plaintiff class in accord with 29 U.S.C. § 216(b). Resp. Br. 21-22. But *state court* FLSA class actions are governed by *state* procedural rules, not by the procedural requirements of § 216(b) which apply in federal tribunals. *Schimerowski v. Iowa Beef Packers, Inc.*, 196 N.W.2d 551, 555 (Iowa 1971).[9] Furthermore, even if federal procedural requirements governed, there is no defect in the FLSA claims of the individual named plaintiffs, as the court below expressly held. (A15).[10] That is more than sufficient to

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[9] No authority cited by respondent or the court below holds the contrary; they all deal with FLSA class actions brought in federal court.

[10] Respondents' bald assertion that the Indiana Supreme Court has misread its own record, and that the named plaintiffs have not in fact complied with § 216(b), Resp. Br. 22, is entitled to no weight, especially given respondents' misrepresentations of the record elsewhere. *See* page 7, *supra*. More importantly, as respondents' own authorities indicate, Resp. Br. 21 n.16, and as should be obvious in any event, § 216(b)'s "opt-in" requirements for FLSA class actions apply only to persons not named in the complaint but whom the named plaintiffs purport to represent; the requirements do not apply to the named party plaintiffs themselves when they seek recovery on their own behalf. *See, e.g., Haynes v. Singer Co., Inc.*, 696 F.2d 884, 885 (11th Cir. 1983); *Partlow v. Jewish Orphans' Home*, 645 F.2d 757, 758 (9th Cir. 1981); *Kinney Shoe Corp. v. Vorhes*,

present the issues of retroactivity doctrine raised in the petition.

Moreover, even if the state sovereignty principles espoused in *National League of Cities v. Usery*, 426 U.S. 833 (1976), did govern the application of the FLSA in this case, the power to coerce institutionalized mental patients into providing free labor for the state is not, and never has been, an integral, core governmental function shielded from federal regulation. *See* Cert. Pet. 27-28. Respondents offer no argument to the contrary.

The issues of how to apply retroactivity doctrine when governing decisions are established and then overruled while a given case is in litigation, and of how to understand the principles of state sovereignty enunciated in *National League of Cities*, are given greater salience by this Court's order of January 10, 1992, granting review in No. 91-543, *New York v. United States*, No. 91-558, *Allegany County v. United States*, and No. 91-563, *Cortland County v. United States*, which invoke the Tenth Amendment and state sovereignty to question the decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Accordingly, the third and fourth questions presented in the petition also warrant plenary review.

CONCLUSION

For these reasons, petitioners urge the Court to grant the writ.

Respectfully submitted,

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564 F.2d 859, 862 (9th Cir. 1977); *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir. 1975); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 n.10 (5th Cir. 1975).

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